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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. **640**

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Petitioner,

vs.

JOHN DOE et al. (Whose Names Are Otherwise Unknown to Plaintiff); NICHOLAS M. BLASSIE, AUGUST GIESEKE, Individually and as Representatives of LOCAL UNION NO. 88; and LOCAL UNION NO. 88, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the St. Louis Court of Appeals,
State of Missouri.

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**To the St. Louis Court of Appeals,
State of Missouri.**

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Missouri Pacific Railroad Company, a corporation, prays that a Writ of Certiorari issue to review the final judgment and decision of the St. Louis Court of Appeals, State of Missouri, entered in the above entitled case, which became final on October 13, 1958.

CITATIONS TO OPINIONS BELOW.

The decision of the St. Louis Court of Appeals hereby sought to be reviewed is officially reported in 315 S. W. (2) 465. It appears in the record (R. 42) and as Appendix A hereto, at page 11.

The decision of the Supreme Court of Missouri refusing to review the case without opinion appears in the Record (R. 8) and as Appendix C hereto, at page 20.

The opinion of the trial court appears in the Record (Tr. 249), and as Appendix D hereto, at page 21.

The opinion of the Missouri Supreme Court transferring the appeal to the St. Louis Court of Appeals on procedural grounds for decision on the merits by the St. Louis Court of Appeals is officially reported in 311 S. W. (2) 15, and appears in the Record (R. 56) and as Appendix E hereto, at page 28.

JURISDICTION.

The judgment of the St. Louis Court of Appeals was entered July 8, 1958 (R. 48), accompanied by its opinion, a copy of which is appended hereto as Appendix A, at page 11. On July 22, 1958, Petitioner Missouri Pacific Railroad Company, timely filed its Motion for Rehearing or in the Alternative to Transfer to the Supreme Court of Missouri (R. 25, 39), which was overruled by the St. Louis Court of Appeals on September 3, 1958 (R. 32). On October 3, 1958, Missouri Pacific Railroad Company timely filed in the Missouri Supreme Court its Application for Transfer requesting that court, in the exercise of its superintending control over other courts of Missouri under Article V, Sections 4 and 10 of the Constitution of Missouri 1945, to review the Court of Appeals decision [R. 8 (c), 11]. On October 13, 1958, the Missouri Supreme Court, En Banc,

denied the application without opinion (R. 8). This petition for certiorari is filed within 90 days after October 13, 1958, the date on which the St. Louis Court of Appeals opinion thus became final. On October 24, 1958, the St. Louis Court of Appeals, on application of Swift & Company,[1] entered its stay of mandate pending this proceeding for Certiorari (R. 4).

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code, providing for review by this court, by Certiorari, of final judgments of the highest court of a State in which a decision could be had where any right, privilege or immunity is specially set up or claimed under the statutes of the United States.

QUESTION PRESENTED.

Whether railroad employees are employees of an "employer" within the meaning of Section 8 (b) (4) of the National Labor Relations Act, so that inducing them to engage in a concerted refusal to transport the goods of another, is cognizable by the National Labor Relations Board, and therefore not the subject of injunctive relief by a state court.

Respondent union posted pickets alongside petitioner's industry track serving the St. Louis plant of Swift & Company, and petitioner's employees thereafter refused to switch the plant. The state trial court granted petitioner an injunction against such picketing on the ground that the picketing interfered with petitioner's duty as a common carrier. The St. Louis Court of Appeals reversed the

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[1] As will hereinafter appear, Swift & Company was the plaintiff below, and this petitioner was an intervening plaintiff. This Petition for a Writ of Certiorari is a companion proceeding to the Petition for a Writ of Certiorari recently filed with this Court by Swift & Company against the same respondents, now docketed in this Court as No. 623, October Term, 1958.

trial court, holding that railroad employees are employees of an "employer" within the meaning of Section 8 (b) (4) of the National Labor Relations Act; that to induce railroad employees to refrain from transporting the goods of another is a violation of the Act over which the National Labor Relations Board has exclusive primary jurisdiction; and therefore that the state court's jurisdiction was preempted. The National Labor Relations Board has held that railroad employees are not employees of an "employer," and therefore that it has no jurisdiction over conduct inducing railroad employees to refrain from transporting the goods of another.

STATUTES INVOLVED.

The statutory provision principally involved is Section 8 (b) (4) of the National Labor Relations Act, as amended, Title 29, U. S. C., Section 158 (b) (4). Also involved are Sections 2 (1) and 2 (2) of the same Act. These sections are set out in Appendix F hereto, at page 42.

STATEMENT OF THE CASE.

Swift & Company operates a large meat packing plant in the City of St. Louis, Missouri, which is served by petitioner railroad. On September 10, 1953, respondent union placed pickets alongside petitioner's so-called "lead track," which furnishes access to all of the switch tracks from which the plant's meat docks are served (Tr. 96-344). The picketing was conducted on a 24-hour basis (Tr. 96-438). After the pickets were placed, none of petitioner's regular crews would switch the lead track to and from the meat docks (Tr. 96-364). About 55 percent of the plant's products move by rail (Tr. 96-24), and all of these products had to move over the picketed lead track (Tr. 96-38). About 200 cars per day are required to serve the plant, and the cars not only have to be spotted and picked up,

but require multiple intermediate moves involving icing, re-icing, and so on (Tr. 96-351, 352).

When the regular crews refused to operate over the lead track, it was necessary to serve the Swift plant with petitioner's supervisory officers (Tr. 96-338 to 341). These supervisory officers (nine in all) included petitioner's System Director of Terminals (Tr. 96-345), one of its Assistant Division Superintendents (Tr. 96-346), its System Supervisor of Fuel Conservation (Tr. 96-347), and other supervisory officers having important duties affecting the safe and efficient management of the railroad (Tr. 96-368, 369, 370, 371). Had the picketing continued, additional supervisory personnel would have been required, and the resulting interference with their normal duties would have seriously affected the railroad (Tr. 96-350, 351, 372).

On September 11, 1953, Swift & Company obtained from the Circuit Court for the City of St. Louis a temporary restraining order enjoining the picketing (Tr. 13). On October 22, 1953, the same court allowed this petitioner to file a petition as intervening plaintiff (Tr. 23, 24). This petitioner (as did Swift & Company) sought a permanent injunction. The Circuit Court granted a permanent injunction both to Swift & Company and to this petitioner (Tr. 259). The Court found that the picketing was illegal as to petitioner because it interfered with petitioner's obligation to operate its railroad (Tr. 255). The Court considered the problem of federal preemption and decided that under the circumstances it had jurisdiction (Tr. 252).

Respondent union appealed to the Missouri Supreme Court, which, without deciding the preemption question, transferred the appeal to the St. Louis Court of Appeals. The St. Louis Court of Appeals, in the decision here sought to be reviewed, held that inducement of railroad employees to engage in a concerted refusal to transport goods is pro-

hibited by Section 8 (b) (4) of the National Labor Relations Act, that the National Labor Relations Board therefore has exclusive primary jurisdiction, and that the state court accordingly was without jurisdiction (R. 23-24). The St. Louis Court of Appeals took this view even though the NLRB has repeatedly held that it has no jurisdiction of complaints based upon the inducing of railroad or governmental employees.

The federal question as to the applicability of the preemption doctrine was raised by respondent union in its answer to petitioner's original intervening petition (Tr. 50), and was argued and briefed throughout the later stages of this proceeding (R. 54-23 to 25; R. 52-8 to 21).[1]

REASONS FOR GRANTING THE WRIT.

The National Labor Relations Board, as noted above, has repeatedly held that inducing railroad or governmental employees not to transport the goods of another is a matter over which the Board has no jurisdiction. The St. Louis Court of Appeals took the contrary view. This is a federal question of substance and importance which this Court has never decided.

If the Board has jurisdiction, the state court, under **Garner v. Teamsters**, 346 U. S. 485, has no jurisdiction. Conversely, if the Board has no jurisdiction, the whole basis for the doctrine of preemption fails, and the state

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[1] In its original intervening petition, this petitioner alleged in general terms that the union's picketing of the railroad spur violated the NLRA. Subsequently, after the decision in *Garner* had been handed down, the petitioner amended its petition to eliminate this allegation (Tr. 71). Conversely, respondent union originally contended that its picketing of the spur could not be a violation of the NLRA because the Act does not apply to railroads (Tr. 246). In any event, the question is not merely what the parties pleaded, but whether "the facts reasonably bring the controversy" within the Act. *Weber v. Anheuser-Busch*, 348 U. S. 468, 481.

court may properly exercise jurisdiction. **United Construction Workers v. Laburnum**, 347 U. S. 656; **International Union v. WERB**, 336 U. S. 245.

Whether the picketing in this case constituted a violation of the National Labor Relations Act turns on the construction of Section 8 (b) (4) of the Act [29 U. S. C., Section 158 (b) (4)]. This section provides that it shall be an unfair labor practice

> "* * * to induce or encourage the **employees of any employer** to engage in * * * a concerted refusal * * * to * * * transport or otherwise handle * * * any goods * * * where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease * * * transporting * * * the products of any other producer * * * or to cease doing business with any other person * * *." (Emphasis supplied.)

The key words of the foregoing section are those emphasized above—"employees of any employer." In order to construe these words it is necessary to turn to Section 2 of the Act (29 U. S. C., Sec. 152) which defines the various terms used throughout the Act. Although Section 2 (1) of the Act defines "person" in such broad terms as necessarily to include a railroad, Section 2 (2) explicitly excludes railroads from its definition of "employer." Section 2 (2) provides:

> "The term 'employer' * * * shall not include the United States or * * * any state or political subdivision thereof * * * or any person subject to the Railway Labor Act * * *."

On its face, then, the Act seems clearly to exclude from its scope the inducing of governmental or railroad employees to engage in proscribed conduct. If railroad employees are not employees of "an employer" within the meaning of the Act, and Section 2 says they are not, then

no violation of the Act is involved where railroad employees are induced to cease transporting goods. However, the Fifth Circuit Court of Appeals has held to the contrary. In **International Rice Milling Co. v. NLRB**, 183 Fed. 2d 21, the court held that the picketing of railroad tracks by a union for the purpose of cutting off transportation to and from the complaining mills was a violation of the Act. The court relied largely on the word "any" which precedes the word "employer" in Section 8 (b) (4) of the Act. The same court adhered to the same view in **W. T. Smith Lbr. Co. v. NLRB**, 246 Fed. 2d 129. Petitioner submits that this construction of the Act does violence to the terms of the Act. The Act as drawn specifies the occurrence of two things, both of which are necessary for a violation of Section 8 (b) (4):

(1) There must be an inducement of "employees of any employer" to refuse to transport or handle goods.

(2) The object of the inducement must be to force "any employer or other person" to cease transporting or handling the goods of any other producer.

As noted above, a railroad is defined as a "person," but not as an "employer," within the Act. It is highly significant, therefore, that the word "person" appears only in part (2) above, dealing with proscribed objectives, and does not occur in part (1) dealing with the means which may not be used to achieve these objectives. If Congress had intended Section 8 (b) (4) to prohibit inducement of railroad employees, it could have said so simply by adding in part (1) the words "or any other person" after the word "employer," as it did in part (2). Congress did not do so, and thus evinced its intention to exclude from the area of **proscribed conduct** the inducement of railroad employees.

The N. L. R. B. has never acquiesced in the two decisions of the Fifth Circuit Court of Appeals, and has held,

except for cases arising in the Fifth Circuit,[1] that the inducing of governmental or railroad employees is not a violation of the Act. This view has been followed by the Board in **Spry Electrical Co.**, 104 N. L. R. B. 1128, and **Paper Makers Importing Co.**, 116 N. L. R. B. 267, both of which involved the inducing of governmental employees. The Board's most recent decision on the point is **United Hatters, Cap & Millinery Workers**, 121 N. L. R. B. 148, handed down in October, 1958, in which the Board held that the inducing of railway employees to cease handling complainant's goods was not a violation of the Act.

This Court has never passed on the question. This Court did hold in **Local Union No. 25, International Brotherhood, v. N. Y. N. H. & H. R. Co.**, 350 U. S. 155, that a railroad is a "person" within Section 2 (1) of the Act, eligible to apply to the Board for relief **where there has been a violation of the Act**, but did not hold that the inducing of railroad employees **was a violation of the Act.** There, the Court will recall, the employees who were induced to cease transportation were employees of a trucking concern, an employer clearly within the meaning of the Act. No question of inducing railroad employees was before the Court.[2]

It would have been futile, in view of the rule followed by the Board outside of the Fifth Circuit, for petitioner to

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[1] In *Herbert A. Spencer et al.*, 119 NLRB 114, a majority of the Board reiterated their view that the inducing of railroad employees did not fall within the Act, but applied the Fifth Circuit rule, since the case before it fell "within the geographical jurisdiction" of that Court.

[2] There has been a conflict in the view of some of the inferior courts on this question. In *Penello v. Seafarers Union*, 40 L. R. R. M. 2180, and in *Wichita Falls & Southern R. Co. v. Lodge No. 176*, 266 S. W. 2d 265, the United States District Court for the Eastern District of Virginia and the Texas Court of Civil Appeals, respectively, held that injunctive relief against such conduct was precluded by the NLRA; and in *Southern Pacific v. Cannery Warehousemen*, 127 F. S. 703, a contrary result was reached without any discussion of the point.

have filed a complaint before the Board.[1] Petitioner therefore was left without a remedy under the decision of the St. Louis Court of Appeals, in spite of the fact that the union picketing, in interfering with petitioner's common law and statutory obligation to furnish indiscriminate service to all shippers, was clearly illegal. **Burlington Transportation Co. v. Hathaway**, 234 Ia. 135, 12 N. W. 2d 167; **Northwestern Pacific Ry. Co. v. Lumber and Saw Mill Workers Union**, 31 Cal. 2d 441, 189 Pac. 2d 277; **Erie Railroad Co. v. Local 1286, International Longshoremen's Assn.**, 117 F. S. 157.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

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[1] This Court has indicated that prior resort to the Board, where "it would be futile to do so," is not a condition to obtaining state court injunctive relief. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

APPENDIX "A".

In the
ST. LOUIS COURT OF APPEALS,
April Session, 1958.

Swift & Company, a Corporation, and Missouri Pacific Railroad Company, a Corporation (Intervenor), (Plaintiffs) Respondents, vs. John Doe et al. (Whose Names Are Otherwise Unknown to Plaintiff); Nicholas M. Blassie et al., (Defendants) Appellants.	No. 30,118 Appeal from the Circuit Court, City of St. Louis; Hon. Waldo C. Mayfield, Judge. Opinion Filed July 8, 1958.

This is an appeal from an order of the Circuit Court of the City of St. Louis granting a permanent injunction against picketing. This appeal, originally taken to the Supreme Court, was transferred to this court for decision. The transfer opinion, Swift & Company v. Doe, Mo. Sup., 311 S. W. 2d 15, clearly and succinctly states the factual background, pleadings, evidence, issues determined below and those preserved for review and briefed on appeal. Entirely sufficient for our purposes, we refer to, adopt and need not repeat here the first fifteen paragraphs of the transfer opinion written by Commissioner Holman, 311 S. W. 2d, loc. cit. 17, 18, 19 and 20.

Appellants-defendants' first contention is that the trial court had no jurisdiction of the subject-matter. The principal question is whether peaceful, orderly stranger picketing of the premises of an employer engaged in interstate commerce, the object of which is to force, coerce and in-

timidate unorganized employees to join a union or to force, coerce and intimidate the employer, by economic pressure, to force, coerce and intimidate the employees to join a union, is an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board, withdrawn under the doctrine of pre-emption from the orbit of state control, or whether such picketing is outside the field of federal pre-emption and therefore subject to regulation by a state equity court under state law. Related questions are (1) the effect of the dismissal of charges filed by Swift with NLRB; (2) the right of Missouri Pacific to resort to the state circuit court for injunctive relief.

Laws of the Congress made in pursuance of the Constitution of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Constitution, Article VI. In the field of Federal-State relations we are bound by and must follow the decisions of the Supreme Court of the United States.

Under the controlling decisions of the Supreme Courts of the United States and of Missouri the state circuit court lacked jurisdiction to issue the injunction upon the petition of Swift. Congress, intending to reach to the full extent of its power under the Commerce Clause, Guss v. Utah Labor Relations Board, 353 U. S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601, has pre-empted the field in labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in NLRB to determine labor disputes involving unfair labor practices which are either protected or prohibited by the Taft-Hartley Act. Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, AFL, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228; Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546; Graybar Elec. Co. v. Automotive, Petroleum & Allied Industries

Emp. Union, Local 618, 365 Mo. 753, 287 S. W. 2d 794; Swope v. Emerson Elec. Mfg. Co., Mo. Sup., 303 S. W. 2d 35; Jack Cooper Transport Co. v. Stufflebeam, 365 Mo. 250, 280 S. W. 2d 832.

In Weber, supra, the court said, 348 U. S., loc. cit. 481:

> "* * * where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

Swift's petition specifically alleged that defendants' acts constituted unlawful picketing in violation of the Taft-Hartley Act. Unfair labor practices reasonably bringing the controversy within the provisions of the Act were charged. Garner; Graybar. Defendants' answer denied these charges. This presented an issue within the legislative scope of the Taft-Hartley Act and it follows that the state circuit court was obliged to decline jurisdiction in deference to NLRB, Garner; Weber; Stufflebeam; Swope, notwithstanding the same acts are unlawful under state policy.[1]

What is the effect of the refusal of the federal administrators to issue a complaint? The specific conduct relied

[1] In Missouri picketing for the purposes indicated has repeatedly been held to violate the free choice guaranteed to employees by § 29, Art. I, Constitution of Missouri, 1945. Swift & Company v. Doe, supra; Quinn v. Buchanan, Mo. Sup., 208 S. W. 2d 413; American Hotel Co. of Mo. v. Bartenders' Inter. League of America, Local No. 422, Mo. Sup., 207 S. W. 2d 411; Bellerive Country Club v. McVey, 365 Mo. 477, 284 S. W. 2d 492; Tallman Co. v. Latal, 365 Mo. 552, 284 S. W. 2d 547.

upon as the basis of the charge of an 8 (b) (1) (A)[2] and 8 (b) (2)[2] violation was that of "Picketing and threatening to picket * * * for the purpose of thereby inflicting such severe economic pressure on said employer through disruption of transportation service, spoilage of product in inventory, and loss of business that such employer will thereby be forced to compel or influence its city salesmen to join the said union which said action on the part of the employer would be in violation of Sections 8 (a) (1) and 8 (a) (3) of the Act, * * *." The charge did not contain the additional allegation made in the petition in the state circuit court, that the purpose of the picketing was to directly force and influence Swift's city salesmen to join the union. The Regional Director, after carefully investigating and considering the case, refused to file a complaint and dismissed the charges, considering that further proceedings were not warranted "inasmuch as the charge alleges activities that do not fall within the scope of Sections 8 (b) (1) (A) or 8 (b) (2)." On appeal the General Counsel sustained the ruling of the Regional Director and "concluded that both the legislative history of the Act and decisional precedent determine that * * * the peaceful picketing * * * (was) not violative of the Act" and that further proceedings were not warranted. We construe the ruling of the General Counsel to be a final determination that the facts charged did not constitute a violation of the Act . . . that the complaint did not state a case under the Act . . . and not (as the union would have us say) that by his ruling the General Counsel or NLRB "sanctioned the picketing," or (as Swift would have us say) that the ruling meant that NLRB had no jurisdiction under the Act, thereby destroying the entire basis for the application of the doctrine of pre-emption and leaving the state circuit court free to exercise its traditional jurisdiction. The ruling of the General Counsel was not a renunciation, dis-

[2] Labor Management Relations Act 1947, § 158 (b) (1) (A), (b) (2).

avowal or abnegation of jurisdiction of NLRB to entertain the proceeding if a proper complaint had been filed. It was an exercise of jurisdiction by the officer who is vested with final authority[3] on behalf of NLRB in respect of the investigation of charges and issuance of complaints, whereby he determined that the particular charges did not violate the Act. It was the construction of a statute, involving an exercise of judgment. No appeal from such a ruling by the General Counsel is provided for in the Act,[4] and his ruling, right or wrong, was final and terminated the proceeding. In Graybar the refusal of the General Counsel to issue a complaint, following an investigation of the charges, on the ground that there was "insufficient evidence to warrant further proceedings" was held to constitute an exercise of jurisdiction by NLRB and a disposition of the case on the merits, and his dismissal of the charges was held not to revest jurisdiction in the state circuit court. Here the ruling of the General Counsel constituted an exercise of jurisdiction, and his dismissal of the charges did not revest jurisdiction in the state court. Graybar; Swope; Guss; Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc., 353 U. S. 20, 77 S. Ct. 604, 1 L. Ed. 2d 613; San Diego Bldg. Trades Council v. Garmon, 353 U. S. 26, 77 S. Ct. 607, 1 L. Ed. 2d 618, and Retail Clerks Local No. 1564, AFL, v. Your Food Stores of Santa Fe, C. A. N. M., 225 F. 2d 659. In the absence of a cession of jurisdiction under § 10 (a)[5] of the Act [absent here and impossible since Missouri has no labor "agency" as contemplated by § 10 (a)] the state circuit court had no jurisdiction to entertain the petition of Swift.

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[3] Labor Management Relations Act 1947, § 153 (d), 29 U. S. C. A.

[4] Labor Management Relations Act 1947, § 153 (d), 29 U. S. C. A.; NLRB v. Swift & Co., C. A. Mo., 233 F. 2d 226; Lincourt v. NLRB, C. A., 170 F. 2d 306.

[5] Labor Management Relations Act 1947, § 160 (a), 29 U. S. C. A.

The opinions of the United States Supreme Court in Guss, Fairlawn and Garmon, handed down after the entry of the judgment from which this appeal is taken, indicate that by vesting in NLRB jurisdiction over labor relations in cases affecting interstate commerce Congress has so completely displaced state power to deal with such relations that even in cases where NLRB has declined to proceed (for policy or "other" reasons) the states may act only where NLRB has ceded jurisdiction pursuant to said § 10 (a). In Guss the United States Supreme Court recognized the problem involved in cases such as this, where NLRB declines jurisdiction and the states are forbidden to exercise it (the creation of "a vast no-man's-land, subject to regulation by no agency or court"), but adhered firmly to the view that Congress has expressed its judgment in favor of uniformity and that "its judgment must be respected whatever policy objections there may be to creation of a no-man's-land." The court suggested that Congress can change the situation at will and that NLRB can reduce the area of the no-man's-land "by reasserting its jurisdiction and, where States have brought their labor laws into conformity with federal policy, by ceding jurisdiction under § 10 (a)."

Nor under the controlling decisions did the circuit court have jurisdiction to issue the injunction upon the intervening petition of Missouri Pacific. In its original petition (filed before Garner was handed down) Missouri Pacific took the firm position that the picketing violated Taft-Hartley, and in its trial brief forcefully argued that the picketing violated § 8 (b) (4) of the Act. After Garner was decided these allegations by leave were eliminated from the railroad's petition but were read in evidence as an admission against interest. Having alleged unfair labor practices under the Act Missouri Pacific is confronted with the language of Weber quoted in the first part of this opinion. Did the facts alleged "reasonably bring the con-

troversy within the sections prohibiting these practices?" Missouri Pacific alleged that the purpose of the picketing was to coerce Swift salesmen to join the union, and to coerce Swift to coerce the salesmen to join, "contrary to the express provisions of the Labor Management Relations Act (Taft-Hartley Act) * * *," and that the members of the union conspired together to prevent the railroad from discharging its statutory duty to render efficient and indiscriminate transportation service to Swift by picketing Swift's plant at the point where the spur tracks enter Swift's premises, whereby the railroad's regular employees (members of three brotherhoods) would not cross defendants' picket line to switch loaded and empty railroad cars in and out of Swift's property, and thus refused to serve the Swift plant. Section 8 (b) (4) (A) of the Act [29 U. S. C. A., § 158 (b) (4) (A)] provides that it shall be an unfair labor practice

> "* * * to induce or encourage the employees of any employer to engage in, * * * a concerted refusal * * * to * * * transport, or otherwise handle * * * any goods * * * where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease * * * transporting * * * the products of any other producer * * * or to cease doing business with any other person * * *."

A railroad is an "employer" within the meaning of § 8 (b) (4) (A), for the reasons stated in International Rice Milling Co. v. NLRB, C. A. 5, 183 F. 2d 21, and W. T. Smith Lumber Co. v. NLRB, C. A. 5, 246 F. 2d 129, entitled as such to protection by NLRB from the kind of unfair labor practices proscribed by § 8 (b) (4) (A). Local Union No. 25, International Brotherhood, T. C. W. & H. v. New York, N. H. & H. R. Co., 350 U. S. 155, 76 S. Ct. 227, 100 L. Ed. 166. Missouri Pacific's intervening petition alleges facts which reasonably bring the controversy within § 8 (b) (4) (A). The railroad contends otherwise upon

the basis of two administrative rulings of the General Counsel of NLRB,[6] but we adhere to the views expressed in International Rice Milling Co. that the inducement of the employees of a railroad (a neutral employer) not to transport goods, by picketing at the situs of the primary employer's place of business, is prohibited by § 8 (b) (4) of the Act, the purpose of which is to protect interstate commerce from injury, impairment, and interruption "by removing obstructions such as the one we have here." And see Wichita Falls & Southern R. Co. v. Lodge No. 1476, Tex. Civ. App., 266 S. W. 2d 265, and Penello v. Seafarers' Intl. Union, D. C. Va., 40 LRRM 2180. NLRB was the exclusive primary tribunal to determine whether the picketing involved constituted an unfair labor practice as to Missouri Pacific and the state circuit court had no jurisdiction to entertain Missouri Pacific's intervening petition for the reasons given and under the authorities cited in connection with our review of the trial court's action on Swift's petition.

Accordingly, the order of the circuit court should be reversed and the permanent decree of injunction dissolved, and the Commissioner so recommends.

Norwin D. Houser, Commissioner.

Per Curiam:

The foregoing opinion of Houser, C., is adopted as the opinion of the court.

The order of the circuit court is, accordingly, reversed and the permanent decree of injunction dissolved.

E. M. Ruddy, Presiding Judge, Concurs.

Lyon Anderson, Judge, Concurs.

James D. Clemens, Special Judge, Concurs.

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[6] Case No. 835, Nov. 6, 1953, 33 L. R. R. M. 1037; Case No. K-700, Oct. 15, 1956, 38 L. R. R. M. 1469.

APPENDIX "B".

September Session, 1958.

Wednesday, September 3, 1958.

Swift & Company, a Corporation, and Missouri Pacific Railroad Company, a Corporation (Intervenor),
Respondents,

vs. Circuit Court No. 67494-D, Div. No. 2.

John Doe et al. (Whose Names Are Otherwise Unknown to Plaintiff); Nicholas M. Blassie; August Gieseke, individually and as representatives of Local Union No. 88; and Local Union No. 88, Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO,
Appellants. } No. 30118.

Now at this day the Court having duly considered the motion of respondent Missouri Pacific Railroad Company, a Corporation, filed herein July 22, 1958, for a rehearing, or, in the alternative, for a transfer of the cause to the Supreme Court of Missouri, doth order that said motion be and is hereby overruled. E. M. Ruddy, Presiding Judge, Lyon Anderson, Judge, and James D. Clemens, Special Judge, sitting.

APPENDIX "C".

In the
SUPREME COURT OF MISSOURI.

September Session, 1958.

Swift & Company, a Corporation, and Missouri Pacific Railroad Company, a Corporation,

Respondents,

47246 vs. Transfer.

John Doe et al. (Whose Names Are Otherwise Unknown), Nicholas M. Blassie et al.,

Appellants.

Now at this day, on consideration of respondents' Applications to transfer the above entitled cause from the St. Louis Court of Appeals, it is ordered that said applications be, and the same are hereby denied.

State of Missouri—SCT.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1958, and on the 13th day of October 1958, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 29th day of October, 1958.

(Seal)

Marion Spicer, Clerk.
.....D. C.

APPENDIX "D".

OPINION OF THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, STATE OF MISSOURI.

Findings of Fact; Conclusions of Law; Order—Judgment—Decree.

Judge Mayfield: Gentlemen, what I say to you now constitutes Findings of Fact and Rulings of Law in this matter, and in behalf of all you gentlemen I want to compliment you for not having cast too much darkness upon the water, and I still say to you when you blow the foam off the top of this case it isn't a complicated case at all. The facts of the case are comparably simple, gentlemen, and I **FIND** them to be:

Findings of Fact.

That, Swift & Company, under the Pleadings and under the Evidence, is a Corporation, and I will refer to them as the "Employer-Plaintiff"; the Railroad Company, "Intervening-Plaintiff," likewise a Corporation, engaged in the Railroad business; the Defendants, a voluntary unincorporated Labor Association, not a sueable entity, as such, in law.

There is not, under this testimony, within the meaning of the law, a "Labor Dispute" between either one or both of the Plaintiffs and the Defendants; there is no dispute here between Swift & Company and the Defendants as to Hours, Wages, Working Conditions, or matters pertaining to Labor.

The letters addressed to and written to the Employer-Plaintiff, Swift & Company, stated that the Defendants seek to organize and want to organize their salesmen. The

letter is not addressed to the salesmen that they seek to organize.

The admissions are, they never contacted those salesmen.

They were contacting the Employer, by the letter and by the written record.

It becomes much in effect like the fellow that desires to marry the girl and is pitchin' all his woo or wisdom at her mother, never letting her, the girl, know that he has anything to say to her or about her.

Anything the salesmen would get there, or the girl would get, would be secondary.

It is possible and I find, that, maybe you have a justification to shoot at one of your neighbors in self-defense, but, if you hit the house of the other neighbor while doing so, you don't justify your conduct, if you miss your aim.

All the efforts were directed toward and to the Employer, Swift & Company, with whom there was no dispute and with whom the Pleadings admit they did not represent a majority of the Employees and had no Contract of relationship with whom and were not arguing Swift & Company should give them a Contract for these Salesmen.

Now, on your question of "Jurisdiction": The Union, here, seeks to recognize, by seeking to organize the Salesmen as a Separate Bargaining Unit under the National Labor Relations Act, that it is such, that it is a unit separate and distinct, subject to be "carved out" from the other sheet of the Employees to make its own contract.

If that be so, all this evidence shows they were not "Production" employees; they were "Maintenance" employees within the meaning of that Act.

There would be much reason why the Act wouldn't apply, because, it applies only to a situation where the con-

troversy is between two people producing the product the majority of which flows into Interstate Commerce.

These Salesmen that the letters and the evidence admit they were seeking to organize didn't have anything to do with the product going into Interstate Commerce.

The Union recognized that separate Bargaining Unit within the meaning of that Act.

You would have an entirely different thing to rule if, here, the Employer, Swift, is refusing to deal with the Defendants, or the Union, as the Contracting Agent for Swift Company and its Production Employees, the major portion of which production would go into or flow into Interstate Commerce, and Commerce would be affected by it, in the meaning and wording of the National Labor Act.

Now, further, gentlemen, on the basis of the proposition about the Jurisdiction, it is not too simple and may be a little more complicated than I deem it to be.

When you come down to the fundamental and elementary principles of the situation, we take some recognition of the fact a great deal has been lost sight of, I am sorry to say, that, there were States that were in existence before our United States Constitution came into power; that, all powers of the United States Government, gentlemen, are derivative powers, they are **not** inherent powers, they are **not** powers given to them by any right except such rights as the States conceded to them when the United States Government was organized;

That, a State, or a set of State Courts should practically be entirely abolished—and that's what the effect of this "pre-emption" is—if this be the Law, then we just as well practically abolish a great big portion of our State procedure, or our State Laws, and hand it all over to the United States Government.

The "Decisions" don't convince me, neither does the "Act of Congress" convince me, that that was their intention or that those were its rulings; and that a State Court has still **some** rights!

In the TALLMAN case, they rule—our **own** Court—that, if there was something the State Court felt demanded action on its part the State Courts would have jurisdiction.

What constitutes **demanding** it!

If this matter be pre-empted—take a commonsense viewpoint of it!—and I am using this violent illustration because I **FIND** all this picketing was peaceful—BUT, suppose there was a **RIOT** out there!

If that can pre-empt it in one instance, that will in another!

The State sits helplessly by and sees their property destroyed, and waiting for the United States Court to step in and take jurisdiction!

When the States get that helpless we better dissolve this Union and some of us go on as States.

Always there have been some fundamental and elementary Rights to preserve under a State Court as a matter of protection.

I repeat—and it was probably due to the "order" of Mr. Blassie and his companions the picketing was "peaceful"—yet, the result of that picketing, shown by this testimony here, gentlemen, would have been perilously destructive when the type of product that is involved here in this matter is considered.

It is comparable, in effect, to a wagon-load of ice standing on the street; it perishes and it is gone if something isn't done in regard to it.

That the destruction occurred peacefully does not deny or forego the fact that the destruction would have resulted.

And destruction of property, in that form, gentlemen, constitutes being an illegal act.

Findings and Conclusions of Law.

I **RULE** and **FIND** under the facts in this case, that, The State Court has Jurisdiction.

I might pay this compliment to a former Member of this Bench, Judge William B. Flynn, he so Ruled; and I likewise pay my respects to Judge Robert L. Aronson who Ruled on the Motion to Dissolve (the Temporary Restraining Order) and Held that the entire matter is **not** preempted by the Federal Acts.

It seems to me, gentlemen, there are still some Rights left in the State Courts. I am not jealous of them, but if we are going to give it all to the United States Government, that's all right with me because it will relieve us of a great many things, but, I can't see, gentlemen, that, where the matter is occurring wholly within the territorial limits of the State of Missouri and occurring entirely between citizens of this State, and there is no "product" involved here—this is not a case of production of product that flows into Interstate Commerce, and, yet, all the "Meat" was directed to the Employer, Swift & Company.

Ruling Appertaining to Intervening-Plaintiff.

Now, as to the Intervenor: Having ruled that the State Court has Jurisdiction—and I admit I haven't convinced Mr. Harry (indicating Mr. Craig) of this at all——

Mr. Craig: Not at all, Judge.

(Judge Mayfield, continuing:) ——unquestionably you were no way—not by a stretch of the imagination—any party the controversy at all, and the Law imposed on you

the obligation, as a Railroad, to do a certain thing—I **FIND** the action of the Defendants in this picketing—of the Defendants in this picketing interfered with and stopped that operation and those acts were illegal. You are entitled, as Intervening-Plaintiff, to the relief sought by you.

The Employer was compelled, under Section 29 of Article I of the Missouri Constitution, to permit their employees to select a Labor Union of their own choice.

That, the Employer was caught in a helpless situation: I **FIND** they had no place to go to, and even after they got the letters from Mr. Blassie and Mr. Gieseke as representatives of the Union, what was there for them that they could lawfully do? Only to sit idly by and see their property and their product destroyed. They could not lawfully go to the Salesmen and say, "Join up with this Union and save our Product"; and if they can't stop the Union from the destruction of it, then, where are they?

I still believe the Common Law Rule and Equitable Principle premise applies, Gentlemen, and I **RULE** it does apply; that, where there is a Right, there is a Remedy!

They had a Right to and they Owned this property, they acquired it lawfully; and to have it destroyed there would have to be some controversy in which they were engaged as an Employer. They were **not** in this controversy in any manner whatsoever; there was no dispute between them and the Union; the Union was not asking Swift & Company to give them a Contract for these Salesmen; they had no lawful Right to ask for that.

It is true, and doesn't make any difference whether I agree with them or not, but I do agree with them that this Picketing was done for Organizational Purposes.

Where it is a controversy as to Employment, or where it is picketing the person you say you want to become a

Member of your Organization, you may have that Right of Freedom of Speech.

They weren't Picketing these Salesmen, gentlemen; it was the Employer that was being Picketed, and with the Employer there was no controversy, because, all the Letters and the Notices were sent to the Employer instead of Notifying the Salesmen. They (the Salesmen) were not Notified but the Employer was Notified, which would bring about only the situation, you might say—and I don't mean this in too harsh a way—it's just a little "covert" blackmail, "If you don't get your men in, we are going to black-list you"; that's what it amounts to.

There are just two ways in which Equity will interfere, and they are, in the Illegal doing of a Lawful Act, or doing something Illegally, or doing something in a Peaceful Manner that Cr[illegible]ates Illegal Results.

The fact the Picketing here was Peaceful—and I FOUND—repeatedly FOUND it was—it created an Illegal situation.

Ruling—Decree—Order—Judgment.

I Rule that, I have Jurisdiction; that, the Relief prayed for by each and both of the Plaintiffs is proper, and the matter is submitted to me on its merits; I **DENY** the MOTION OF DEFENDANTS TO DISSOLVE THE TEMPORARY INJUNCTION, and **ORDER** the Injunction heretofore Issued to be made PERMANENT: and Costs taxed against the Defendants.

APPENDIX "E".

In the
SUPREME COURT OF MISSOURI,
Division Number One,
January Session, 1958.

Swift & Company, a Corporation,
Plaintiff-Respondent.

and

Missouri Pacific Railroad Company, Corporation,
Intervening Plaintiff-Respondent,

vs.

John Doe et al. (whose names are otherwise unknown to plaintiff);

Nicholas M. Blassie; August Gieseke, individually and as representatives of Local Union No. 88;

and

Local Union No. 88, Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO,
Defendants-Appellants.

No. 45,973

Appeal From the Circuit Court of the City of St. Louis
Honorable Waldo C. Mayfield, Judge.

Plaintiff, Swift & Company, instituted this action to enjoin the defendants from picketing its St. Louis, Missouri plant which is known as the St. Louis Independent Packing Company. The trial court granted a permanent in-

junction and defendants have duly appealed from that decree.

Since we have determined that we do not have appellate jurisdiction of this case, our factual statement will not be as complete as it would otherwise be. However, we will attempt to state such portions of the pleadings and evidence as to disclose the issues determined in the trial court and the issues briefed and preserved for review in this court.

The plant involved in this case is one of the largest packing plants in the country and plaintiff employs, in the operation thereof, approximately 2,400 employees. About 2,000 of its employees belong to the Packing House Workers Union and its truck drivers (about 40) are represented by Local 700, Packing House Chauffeurs, Warehousemen and Helpers of America. No dispute existed between plaintiff and the aforementioned unions at the time of the occurrences hereinafter detailed. The testimony indicated that plaintiff had on hand in its St. Louis plant approximately 12 million pounds of meat products at all times which were in various stages of processing involving from a few days to as long as 120 days. Its cold storage capacity was 3,800,000 pounds and the same was substantially full at all times.

The defendants are officers and members of Local Union 88, Amalgamated Meat Cutters and Butchers Workmen of North America, hereinafter referred to as the Union. That union is not incorporated and the defendants were named as representatives of the entire membership of the union. In the spring of 1952, the union started upon a campaign to organize the "white-collar salesmen" employed by various St. Louis packing houses. The employees involved in this case are plaintiff's thirty-one city salesmen who call upon the retail stores in the greater St. Louis area.

On May 15, 1952, the secretary of the union sent a letter to the plaintiff advising that the union was interested in persuading these salesmen to apply for membership in the union and that the union was contemplating establishing a picket line at the company premises in an effort to enlist public support and influence in bringing about the affiliation of these employees with the union. However, the union did not picket at that time but temporarily changed its method of approach and requested its members that were employed in markets in the St. Louis area to solicit the salesmen to become union members. In the following fifteen months the union was successful in organizing the salesmen of all but the three largest packing plants in the St. Louis area. That campaign involved picketing at the plant of the Krey Packing Company.

On September 2, 1953, the secretary of the union sent another letter to the plaintiff advising that the union intended to begin picketing the premises on September 10 for the purpose of publicizing the fact that plaintiff's salesmen were nonunion. He also stated that notice of the intention to picket was given at that time in order that plaintiff could make arrangements for handling its perishable products. On September 10, 1953, pickets were placed at transportation entrances into the plaintiff's premises and the picketing was maintained on a 24-hour basis. No pickets were placed at entrances used by the 2,400 employees of the plant or the entrance to the company's test kitchen which is visited by large numbers of housewives. The result of the picketing was to make it difficult for plaintiff to make delivery of its products to retail outlets. The company's forty truck drivers refused to cross the picket line, as did a large percentage of the drivers for commercial trucking companies. Pickets had been placed on Spring Avenue just north of the Missouri Pacific Railroad track which entered the plaintiff's plant.

Ordinarily, the railroad would handle the switching involved in icing, loading, re-icing and shipping out approximately 200 refrigerator cars of meat per day from that plant. As a result of the picketing the regular crews of the railroad refused to cross the picket line and, after some delay, the railroad company was able to obtain supervisory employees who handled at least a part of that switching. As a result of the picketing plaintiff was unable to obtain transportation facilities for a considerable part of its products that were ready for shipment to purchasers.

On the following day, September 11, plaintiff filed the instant action and obtained a temporary restraining order, as a result of which the pickets were withdrawn about 7 p. m. on that day.

Plaintiff in its petition alleged that "the sole purpose of the picketing activities of defendants herein described is to force, influence, threaten, coerce, and intimidate the said salesmen employed by plaintiff to join defendant union, contrary to the express provisions of the Labor Management Relations Act (Taft-Hartley Act), and the law of the State of Missouri, and to force, influence, threaten, coerce, and intimidate plaintiff to influence and coerce the said salesmen to join the said defendant union, contrary to the express provisions of the Taft-Hartley Act and the law of the State of Missouri, and Section 29 of Article I of the Constitution of Missouri." It was also alleged by plaintiff and admitted by defendants that "plaintiff is engaged in Interstate Commerce and that both plaintiff and its employees are subject to the provisions of the Labor Management Relations Act of 1947 (Taft-Hartley Act)."

On October 22, 1953, the court made an order permitting the Missouri Pacific Railroad Company to file a petition as an intervening plaintiff. In that petition the railroad

company alleged that the defendants had established the picket line knowing that the employees of the intervening plaintiff would not pass such pickets and that establishment of said picket line would prevent the intervening plaintiff from complying with its duty to serve Swift & Company; that by the terms of certain designated laws of the State of Missouri and of the Interstate Commerce Act, intervening plaintiff was compelled to render efficient and indiscriminate service to plaintiff; that in an effort to comply with the law, the railroad used certain of its managerial officers in switching crews to serve said plant, but that the railroad could not continue to use such officers for that purpose for the reason that in the safe and efficient operation of the railroad its officers could not be taken from their important supervisory work to perform such switching services, and hence the railroad sought injunctive relief against such picketing.

Defendants in their answer admitted that they did not represent any of plaintiff's employees and did not claim the right to bargain for said employees. It was further alleged that if the allegations of plaintiff's petition as to the purpose of the picketing were true, such would constitute a violation of Section 7, as well as Section 8 (b) (1) (2) of the Labor Management Relations Act of 1947, and such acts would constitute unfair labor practices and that, under the provisions of said Act, the means are provided for the prevention and correction of said unfair labor practices and that the processes of the Act are exclusive for the prevention and correction of said unfair labor practices; that "the field has been occupied and preempted by Congress and that this court is therefore without jurisdiction to entertain plaintiff's petition."

It was further alleged that the picketing was done for the purpose of informing the public generally of the fact that plaintiff's salesmen were nonunion, and that the picketing was conducted in a peaceful, orderly, and law-

ful manner. It was also alleged that any order of the court denying defendants the right to picket under the circumstances existing would deprive defendants of their rights under certain designated sections of the Constitution of the United States and of the State of Missouri.

It is tacitly admitted that the picketing in this case was peaceful and orderly. It was admitted by the officials of the union that no steps had been taken to organize these city salesmen by talking with them, inviting them to meetings, or in any other way explaining the advantages they contended would result from union membership. After the temporary restraining order was entered there was considerable evidence to indicate that the officials of the union requested its 1,650 members who own, or are employed in, markets in the St. Louis area not to purchase products from plaintiff's salesmen, and the evidence indicates that this campaign was rather successful.

In the early part of November 1953 Judge Flynn, of the St. Louis Circuit Court, heard evidence on the question of whether or not a temporary injunction should be granted and the cause was taken under advisement and the restraining order continued in effect. Thereafter, in January 1954, the plaintiff filed two charges with the Regional Director of the National Labor Relations Board, one alleging unfair labor practices against the union, by reason of the picketing, in violation of Sections 8 (b) (1) (A) and 8 (b) (2), 29 U. S. C. A., Section 158, and the second alleging secondary boycott activities in violation of Section 8 (b) (4) of said Act. The regional director investigated and considered the first charge and declined to take further action, stating, "It does not appear that further proceedings are warranted inasmuch as the charge alleges activities that do not fall within the scope of Sections 8 (b) (1) (A) and 8 (b) (2)." This ruling was appealed to the general counsel who sustained the ruling of the

regional director. The regional director, however, issued a complaint on the boycott charge and obtained the ruling of the board to the effect that such boycotting constituted an unfair labor practice and the union was ordered to cease and desist from such practices. This ruling was affirmed on appeal. Amalgamated Meat Cutters, Etc. v. National Labor Relations Board, 237 F. 2d 20. It may also be noted that the National Labor Relations Board filed an action in the U. S. District Court seeking to restrain Swift & Company from enforcing the temporary restraining order obtained in the instant case. That relief was denied by the District Court, National Labor Relations Board v. Swift & Company, 130 F. Supp. 214, and that ruling (as to the result) was affirmed on appeal. 233 F. 2d 226.

Judge Flynn retired before any decision was entered concerning the issuance of the temporary injunction in the instant case, and the cause was assigned to another division of the circuit court. The cause was tried in October 1956. It was stipulated that said trial would constitute a hearing upon both the temporary and permanent injunctions. It was further stipulated that the trial judge could consider all of the evidence taken at the prior hearing before Judge Flynn, and that either party could read in evidence testimony taken in certain proceedings in the U. S. District Court. At the conclusion of the trial the court, as heretofore stated, entered a decree enjoining the defendants from picketing in the vicinity of plaintiff's plant or in the vicinity of the railroad tracks used by the intervening plaintiff in transporting property to and from the plant.

The primary contention of defendants upon this appeal is that the trial court had no jurisdiction over the subject matter because picketing for the purpose alleged in the petition was a violation of the Labor Management Relations Act, and the National Labor Relations Board was the

exclusive primary tribunal to determine the controversy (see Graybar Electric Co. v. Automotive, P. & A. I. Emp. Union, 365 Mo. 753, 287 S. W. 2d 794, and cases cited therein). For their second point defendants contend that (assuming the trial court had jurisdiction), neither the petition nor the evidence was sufficient to support injunctive relief on the theory that there was a violation of Section 29, Article I, Constitution of Missouri 1945. Other assignments in the appellants' brief concern alleged deficiencies in the proof and trial errors, which, in the view we take of this appeal, need not be noticed further.

Although our appellate jurisdiction is not questioned, we must raise and determine that question. Metzger v. Metzger, Mo. Sup., 145 S. W. 380. We quote from defendants' jurisdictional statement wherein they state that they "pleaded in their answer that to deny picketing under the circumstances in this case would violate rights guaranteed by Sections 8, 9 and 29 of Article I, Constitution of Missouri 1945, and by the First and Fourteenth Amendments to the United States Constitution; further, that the trial court had no jurisdiction over the subject matter of the action because Congress had granted exclusive jurisdiction thereof to the National Labor Relations Board. Thus, jurisdiction of this appeal is conferred on this court * * *." However, as previously indicated, the only constitutional provision mentioned or cited in the "Points Relied Upon and Authorities" in defendants' brief is Section 29, Article I, Constitution of Missouri 1945, V. A. M. S. (hereinafter referred to as Section 29), which reads as follows: "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

In determining questions concerning our appellate jurisdiction we look to Section 3, Article V of our Constitution which provides, in part, as follows: "The supreme court

shall have exclusive appellate jurisdiction in all cases involving **the construction** of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, * * * and until otherwise provided by law, in all cases where the amount in dispute, exclusive of costs exceeds the sum of seventy-five hundred dollars." (Emphasis ours.) We have heretofore stated that, "In cases involving the appellate jurisdiction of this court, we have sedulously retained to ourselves the right to look within the shell of briefs, pleadings, and transcript to the kernel of the thing, to see if the jurisdictional question is of substance; for to give life to a jurisdictional question it must be real, not colorable only." Jenkins v. Local Union No. 6313, Etc., Mo. Sup., 263 S. W. 2d 337, 339. Also, we have said that "in order to preserve a constitutional question for review the question must be raised at the first available opportunity; the sections of the constitution claimed to have been violated must be specified; the point must be presented in the motion for a new trial, if any; and it must be adequately covered in the briefs." Ingle v. City of Fulton, Mo. Sup., 260 S. W. 2d 666, 667. The rule is also settled that we will not assume jurisdiction of a case on the ground that a constitutional question is involved when the identical question sought to be invoked has been settled by prior decisions of the Supreme Court. City of Marshfield v. Brown, 337 Mo. 1136, 88 S. W. 2d 339; Metzger v. Metzger, supra.

Assuming (for the sole purpose of determining our appellate jurisdiction) that the circuit court had jurisdiction of the subject matter of this action, we think it may fairly be said that the real and fundamental issue tried in that court was whether or not the picketing was unlawful in that it was for the purpose of forcing plaintiff to coerce its salesmen into joining the union, and selecting as their bargaining representative, contrary to the provisions of

Section 29 and the Labor Management Relations Act, supra. In that connection it may be stated that we have repeatedly held that picketing for that purpose is violative of the free choice guaranteed to employees by Section 29. Quinn v. Buchanan, Mo. Sup., 298 S. W. 2d 413; American Hotel Co. v. Bartenders' International L. of A., Mo. Sup., 297 S. W. 2d 411; Bellerive Country Club v. McVey, 365 Mo. 477, 284 S. W. 2d 492; Tallman Co. v. Latal, 365 Mo. 552, 284 S. W. 2d 547. No additional construction of Section 29 is necessary in regard to that point and we do not understand that such is sought in defendants' brief.

It may also be noted that under Point II (D) of defendants' brief it is contended that the evidence would not support a finding that the picketing was for the purpose of forcing plaintiff to coerce its employees, but that, at most, it would only support a finding that the picketing was for the purpose of forcing plaintiff to merely encourage its employees to join the union, which was not a violation of Section 29. That contention does not require a construction of Section 29, as plaintiff makes no contention that it would be a violation of that section, for it to merely encourage its employees to join the union and, moreover, we have ruled in the cases heretofore cited that the use of lawful persuasion is not prevented by that constitutional provision.

However, under Point II (B), defendants point out that plaintiff's petition alleges that the purpose of the picketing was to force the employer to coerce the employees into joining defendants' union in violation of Section 29, and, in that connection, defendants contend that the petition does not state facts sufficient to constitute a claim against defendants because, "it is only coercion of employees in their choice of bargaining representative that is unlawful under that constitutional provision, and merely coercing

employees to join a particular union is not violative thereof." Even if we assume that this contention would ordinarily call for a construction of Section 29, we rule that such is not required under the facts and circumstances existing in the instant case in order to determine the issue as to whether the petition stated facts which were sufficient to constitute a claim against the defendants.

In the first place it should be noted that it was assumed by the defendants in their answer, and by all parties throughout the trial, that the petition alleged that the purpose of the picketing was to force plaintiff into coercing its employees into joining the union and choosing the union as their bargaining representative, or that the latter was encompassed within the allegation actually made. Note the following in defendants' answer: "These defendants state that the allegations of plaintiff's petition to the effect that the picketing has as one of its objectives the compelling of plaintiff to coerce its employees into becoming members of the union **or the coercing of plaintiff's employees in their right to be represented by representatives of their own choosing** alleges acts and conduct which, if true, constitute a violation of Section 7 as well as Section 8 (b) (1) and (2) of the Labor Management Relations Act of 1947." (Emphasis ours.) Moreover, in the opening statement made by counsel for defendants at the time of the trial before Judge Mayfield, the following appears: "The pleadings themselves reveal that throughout this entire case both plaintiffs have contended in their pleadings that the object or purpose of the union undertaking was to exert sufficient economic pressure upon Swift & Company so as to force, by that economic pressure, Swift & Company to in turn coerce its employees, in the rights that the employees have, to stand and be **represented** by representatives of their own choosing. Counsel for Swift & Company repeated that position again this morning; the pleadings set it forth clearly and Your Honor will observe

in the transcript (of Order to Show Cause Hearing) the position is repeatedly taken, namely, the activities of the Union sought to force Swift to coerce its employees in their rights to be or not to be **represented** by a Union of their own choosing."

It may also be noted that there was considerable evidence admitted (without objection on the ground that it was beyond the pleadings) from which it could reasonably be found that defendants were seeking to persuade plaintiff's employees to join the union so that it could act as their bargaining representative, and there was no evidence to the contrary.

Since defendants did not attack the petition in the trial court, and since the case was tried on the theory that coercion of the employees in their choice of the union as a bargaining representative was an issue, if (which we do not decide) such an allegation is necessary in order that the petition may state a claim, it will be treated as amended in that respect. Section 509.500, R. S. Mo. 1949, V. A. M. S.; Woolfolk v. Jack Kennedy Chevrolet Co., Mo. App., 296 S. W. 2d 511.

Since it appears that it is not essential to a decision of the question concerning the sufficiency of the petition that we determine the only point raised by defendants which might require a construction of the constitution of this state, we rule, as heretofore indicated, that we do not have appellate jurisdiction on that ground. Rollins v. Business Men's Acc. Ass'n, Mo. Sup., 213 S. W. 52; Home Owners' Loan Corporation v. Caplan, 349 Mo. 353, 160 S. W. 2d 754.

It is intimated in defendants' jurisdictional statement that we have appellate jurisdiction because the appeal involves questions concerning the application of the Labor Management Relations Act, 1947, 29 U. S. C. A., Sections 141 et seq., and the alleged exclusive jurisdiction of the

subject matter by the National Labor Relations Board. In order to vest this court with appellate jurisdiction because of the existence of a so-called "federal question" it is required that the appeal involve the **validity** of a statute of the United States or the **validity** of authority exercised under the laws of the United States. We think it apparent that no such question is here involved. "The necessity for an interpretation and application of the terms of a federal statute does not bring the case within the state constitutional provision conferring appellate jurisdiction on this court on the theory that the validity of authority exercised under the laws of the United States is in question." Kansas City Terminal Ry. Co. v. Manion, Mo. Sup., 290 S. W. 2d 63, 70.

We have also considered the question as to whether we have appellate jurisdiction because of the amount in dispute. No damages were sought by plaintiff so there was no amount in dispute in that respect. However, it has been said that "When the object of an action is not to obtain a money judgment, but other relief, the 'amount in dispute,' in an appellate jurisdictional sense, must be determined by the value in money of the relief to plaintiff, or the loss to defendant, should the relief be granted, or, vice versa, should the relief be denied." Ingle v. City of Fulton, supra, 260 S. W. 2d 666, 668. It does not appear from the evidence that there was any monetary loss to defendants by reason of the entry of the decree. There is evidence from which it may reasonably be said that plaintiff would suffer a large amount of damages in the event of prolonged picketing. However, if the relief sought by plaintiff had been denied, we cannot say with certainty that the resulting damages would have exceeded $7,500, as it is purely speculative to attempt to predict how long the picketing would have continued. It might have been terminated in an hour, or it might have continued for a day or a month or a year. We therefore conclude that it does

not affirmatively appear that an amount in excess of $7,500 was in dispute.

This court being without appellate jurisdiction, the cause is transferred to the St. Louis Court of Appeals.

Lawrence Holman,
Commissioner.

Van Osdol, C., Concurs.

Coil, C., Concurs.

Per Curiam. The foregoing opinion by Holman, C., is adopted as the opinion of the court.

All concur.

APPENDIX "F".

National Labor Relations Act, as amended, Title 29, United States Code, Section 151 et seq:

Section 2. **Definitions.**

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 8 (b). **Unfair Labor Practises.**

It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to per-

form any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.